Supreme Court, U.S.
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No. 01-521

In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, et al.,

Petitioners,

v.

VERNA KELLY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA, ARIZONA, MISSOURI, MONTANA, OKLAHOMA, OREGON, TEXAS AND WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI STATES

Amici are States that have adopted a canon of Judicial Ethics modeled on Canon 5 of the ABA Model Code. Some of the States, like Minnesota, have adopted a canon that bars a judicial candidate from "announcing" his or her views on legal or political issues that are likely to come before the court.[1] Others have adopted a canon that bars the making of statements that "commit" or "appear to commit" the candidate with respect to cases, controversies or issues that could come before the courts. *See* Appendix A. Amici come before the Court as a community of related sovereign States to represent the interests of their own citizens in ensuring the election of impartial judges, not only in their own home States, but in all States across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The majoritarian difficulty asks not how elected/unaccountable judges can be justified in a regime committed to democracy,[2] but rather

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[1] As written, Minnesota's Canon forbids a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." 52 M.S.A., Code of Jud. Conduct, Canon 5A(3)(d)(i); Pet. App. 134a. The district court construed the phrase "legal or political issues" to mean "issues likely to come before the court." Pet. App. 129a. That construction has been confirmed by the Minnesota Supreme Court. *See* Appendix B.

[2] *Cf.*, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (Yale, 2d ed. 1986) ("The root difficulty is that judicial review is a countermajoritarian force in our system.").

> how elected/accountable judges can be justified in a regime committed to constitutionalism. . . . When those charged with checking the majority are themselves accountable to, and thus influenced by, the majority, the question arises how individual and minority protection is secured.[3]

Just as the Framers of the Constitution confronted the "countermajoritarian difficulty" in resolving on an appointive, life-tenured judiciary for the United States, so do States continually confront the "majoritarian difficulty" presented by having an elected judiciary. What is mandated by fundamental notions of due process is an impartial judiciary. *In re Murchison*, 349 U.S. 133, 136 ("A fair trial in a fair tribunal is a basic requirement of due process.") And the satisfaction of this mandate calls upon the States to reconcile their commitment to judicial accountability (the democratic ideal), on the one hand, and their commitment to judicial impartiality (the constitutional ideal), on the other. The history of state regulation of judicial ethics has been a continuous experiment to the end of a perfect reconciliation of these ideas.[4] The States have not yet succeeded, but the Tenth Amendment guarantees to them the right to keep trying. *See, Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (O'Connor, J., concurring); *New State Ice Co. v. Liebmann* 285 U.S. 262,

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[3] Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U.Chi.L.Rev. 689, 694 (Spring, 1995).

[4] *See, e.g.*, Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts* 61-SUM Law & Contemp. Probs. 79, 87-99 (Summer, 1998).

311 (1932) (Brandeis, J., dissenting); *cf., Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (States' power to determine the qualifications of their most important government officials is reserved by Tenth Amendment).[5]

1. Accountability can never trump impartiality as the overarching governing rule for courts. Impartiality of the judiciary is *sine qua non* to the fundamental legitimacy of any government. Citizens must have confidence that their cause will be judged only in accordance with the Rule of Law. Moreover, confidence in the impartiality of every State's judiciary is essential to securing that "general citizenship" of all states' citizens, *Cole v. Cunningham*, 133 U.S. 107, 113 (1890), which is the vision of both the Comity Clause, Const., art. IV, § 2, cl. 1, and the Fourteenth Amendment. For States who will surrender neither the ideal of impartiality nor the ideal of accountability, Canon 5 is essential.

2. Canon 5 is part of that ongoing experiment to reconcile the competing interests of the "majoritarian difficulty." It seeks to secure that area of speech that is most

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[5] Alexis DeTocqueville, predicted: "I am aware that a secret tendency to diminish the judicial power exists in the United States. . . . Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself." 1 Alexis de Tocqueville, *Democracy in America* 329 (Shocken Books ed., 1961).

conducive to producing an informed electorate, while excluding only that area of speech that threatens the ideal of a judiciary independent of allegiance to special interests. Canon 5 reflects the common sense understanding that a judge who feels he is beholden to special interests for his job may be unable to judge impartially. *Cf., Tumey v. Ohio*, 273 U.S. 510 (1927) (due process violated because adjudicator, town's mayor, received compensation each time he convicted a defendant, but received nothing if he acquitted). It is essential to ensuring that sitting judges are not placed at an unfair disadvantage because of their own, distinct, ethical obligations to refrain from commenting on pending matters. *See, e.g.*, Cal. Code of Jud. Ethics, Canon 3B(9). And Canon 5 is essential to staunch the flow of ethical judges who leave the bench because of increasing stress due to political pressures.

ARGUMENT

I. THE PUBLIC HAS A COMPELLING INTEREST IN ENSURING THE IMPARTIALITY OF EVERY STATE'S JUDICIARY

1. The core objective of Canon 5A of Minnesota's Code of Judicial Conduct and Canon 5 of the ABA Model Code is to ensure an impartial judiciary. It is difficult to imagine a more compelling public interest. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of even-handed justice . . . is at the core of due process"). Impartial adjudication – adjudication in accordance with the established Rule of Law, rather than in accordance with personal views – is the foundation of a judiciary's essential legitimacy. *See*

Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."). Applying the Rule of Law is, of course, not always an easy task. Still, we insist that judges have "allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law." Felix Frankfurter, *Chief Justices I Have Known*, in *Of Law and Men* 138 (Elman ed. 1956).

It has often been in the discussion of stare decisis that this Court has had occasion to reiterate the primacy of law over man, which is the cornerstone of judicial impartiality. In concurring based upon a precedent with which he disagreed, Justice Stevens observed that "[c]itizens must have confidence that the rules on which they rely in ordering their affairs – particularly when they are prepared to take issue with those in power in doing so – are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dept. of Health v. Florida Nursing Home Ass'n.*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

2. Citizens in States with an elected judiciary unquestionably share this interest in an impartial judiciary. To be sure, permitting judges to be elected, rather than appointed, is consequential. But this does not mean that the interests of voters in the election of judges is the same as their interests in the election of legislators or executive branch leaders. To the contrary, when voting for judges, the voter's interest is as a potential future litigant; when voting for legislators and executives, the voter's interest is that of one constituent out of thousands. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics* 1059 (Summer, 1996). Impartiality – in the sense described above – is indispensable with respect to the former interest, not to the latter. Indeed, this Court implicitly has recognized that voter interest in judicial elections (unlike in legislative elections) is not about the opportunity to have personal or partisan points of view represented i a department of government. *See Wells v. Edwards*, 409 U.S. 1095 (1973) (one-person, one-vote requirement does not apply to apportionment of judicial districts).

It is, therefore, no answer to assert that the State could not impose a rule akin to Canon 5 on legislative or executive branch elections. Those campaigns involve election of representatives to the political branches of government. Campaign debate in such a context is the precursor of debate within and between those branches, and campaign speech thus apprizes the voter of a candidate's position within the anticipated realm of debate. But the judicial process is not one of debating toward what the law *should* be. It is rather the finding of what the law *is*. *Cf., Tennessee Valley Authority v. Hill*, 437 U.S. 153,

194-195 (1978) ("Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.").

Legislatures are large, multi-member bodies, which act upon the society at large. Even the voter whose candidate is defeated in an election is not, thereafter, powerless. Acting collectively with other members of a political party and with supporters of other legislators, he or she is still able to influence the enactment of legislation. But judges, unlike legislators, act individually – or, in the case of a reviewing court, as a small group that reaches decision in secret. And judges act upon individuals, in individual adjudications. Thus, although political corruption is the subversion of a process, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985), a single corrupt legislator, acting alone, cannot deny due process to any individual. By contrast, the election of a single biased judge can. The public interest in electing impartial judges should, therefore, be given greater weight than is the public interest in preventing corruption in legislative or executive campaigns.

3. This heightened interest in the election of impartial judges is held not only by the citizens of States that hold judicial elections; it is held by the citizens of all States. Citizens of one State may be subject to the judgments of another State's courts by operation of the Full Faith and Credit Clause, Const., art. IV, § 1. Similarly, the Comity Clause, Const., art. IV, § 2, cl. 1, among whose central purposes was "to make American citizens as free in one State as in another," *Ogden v. Saunders*, 12 Wheat.

213, 274 (1827), opens the doors of every State's courthouse to the citizens of every other State. *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3 (1950). Perhaps more importantly, citizens of Amici States may find themselves defending against prosecution or civil action in Minnesota courts.

Despite their "general citizenship," *Cole v. Cunningham*, 133 U.S. at 113, the citizens of Amici States cannot vote for a Minnesota judge, no more than they can vote for a Minnesota legislator. *See Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978) (acknowledging that suffrage has been understood to be tied to an individual's identification with a particular State). But, unlike a legislator, a Minnesota judge owes a duty of constitutional dimensions to non-citizens who appear before him in his official capacity. Indeed, this constitutional duty extends even to those who are not citizens of the United States. *See, Plyler v. Doe*, 457 U.S. 202 (1982) (equal Protection Clause applicable to illegal aliens).

The interest sought to be protected by Minnesota's Canon 5 concerns more than systemic corruption. It is addressed to the protection of individual liberty interests that are shared by all of the residents of Minnesota, voter or not, and indeed, by all of the residents of Amici States.

II. CANON 5 ACHIEVES A REASONABLE BALANCING OF COMPETING IMPORTANT INTERESTS

Minnesota's Canon 5, as limited by the Minnesota Supreme Court, *see* note 1, is sufficiently flexible to permit communication of information important to voters in

judicial elections. As limited, Canon 5 proscribes only discussion of "issues," and then, only those issues that are *"likely* to come before the court." Pet. App. 129a (emphasis added). As the Court of Appeals correctly noted, "general discussions of case law or a candidate's judicial philosophy do not fall within the scope of the announce clause." Pet. App. 54a. Moreover, as the court also pointed out, the Minnesota Judicial Board had approved extensive lists of sample questions that interested voters could pose to judicial candidates consistent with Canon 5, that these were "wide-ranging," including such topics as a candidate's judicial philosophy, issues relating to the administration of justice in criminal, juvenile, and domestic violence cases, and the candidate's perception of a judge's role in the judicial system. Pet. App. 5a.

That speech which is limited by Canon 5 – speech which "announc[es]" a judicial candidate's views on issues likely to come before the court – is limited by necessity. Enforcing Canon 5 is the only way to ensure that judicial elections do not deteriorate into full-scale debates with potentially destructive consequences to the administration of justice. If one candidate is *permitted* to announce his views on controversial legal issue, then, realistically, all other candidates *must* announce their views – either for the purpose of showing that they share the same views or for distinguishing themselves from the other. Candidates who, out of respect for the integrity of the judicial process, would prefer not to announce their views on a controversial legal issue, will have no realistic choice but to do so or surrender the election.

Election campaign pressures threaten the integrity of the judicial system. Even with Canon 5 there are great pressures on elected judges to do justice without regard to the possible electoral consequences of doing so. As Justice Stevens is reported to have told the American Bar Association Annual Meeting in 1996: "[I]t was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.' "[6] In another expression of dismay over the challenges to judicial impartiality, the late Otto Kaus, a universally respected Justice of the California Supreme Court, observed that adjudicating controversial cases during an election is "like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving." Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 Notre Dame L. Rev. 1133 (May 1997); *see also* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. Cal. L. Rev. 1969, 1980 (September 1998).

These pressures are compounded by Canon 3B(9) of the ABA Model Code which precludes sitting judges from "mak[ing] any public comment [about a pending or

[6] Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting 12 (Aug. 3, 1996) (quoting Florida Supreme Court Justice Ben Overton), *reported in* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U.L.Rev. 308, 310 (1997).

impending proceeding in any court] that might reasonably be expected to affect its outcome or impair its fairness."[7] In 1986, for example, allegiance to ethical considerations nearly doomed the campaign of North Carolina Supreme Court Justice James Exum for election to the position of chief justice. Justice Exum was targeted for his death-penalty decisions by supporters of his opponent, but he chose not to respond to comments made during news conferences by families of murder victims. Fortunately, in this case Justice Exum's opponent was also a sitting supreme court justice who graciously defended his colleague's silence as compelled by the rules of ethics.[8] It is quite likely that notorious legal issues of interest to the voting public will also be implicated in matters pending in the courts, *see* Uelman, *supra*, and sitting judges risk defeat at the polls for being unable to respond to a competitor's announcement of his views on the issue. Indeed, Professor Carrington suggests that the bad situation is made even worse by media contribution to public cynicism: "[S]itting judges may with increasing frequency be sitting ducks. The retention election devised as part of the Missouri plan has become, as a result of the advent of the negative spot commercial, a

[7] Professor Rotunda strongly endorses this Canon, at least insofar as it relates to proceedings in the judge's own court. *See* Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and Sanctions – A Case Study of the Microsoft Litigation*, 2001 U. Ill. L. Rev. 611 (2001).

[8] *See* Samuel Latham Grimes, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. Rev. 2266, 2288 (September, 1998).

potential nightmare; candidates for retention in high judicial office can be especially vulnerable to electronic attack because they cannot reciprocate in kind against an adversary." Carrington, *supra* at 111.

In the end, if Canon 5 should be stricken down, the public will be the loser. Not only will public cynicism about judicial processes likely deepen, but ethical judges, with increasing frequency, will be defeated at the polls for their silence in the face of attacks by candidates unrestrained by rules of ethics. Alternatively, qualified judges will simply leave the bench in despair of being unable any longer to ignore the crocodiles in their bathtub. Justice Kaus, for one, retired from the California Supreme Court in 1986, during an extremely contentious election campaign to unseat three Supreme Court justices because of their death-penalty decisions – even though he was not himself on the ballot.

Recusal is no answer. As a threshold matter, recusal is an individual remedy and does not address the lack of public confidence in a system that permits political passion to infect its judicial processes. A recent national survey conducted for the National Center for State Courts revealed that a troubling 81% of the population agreed with the statement: "Judges' decisions are influenced by politics." National Center for State Courts, Survey, *How the Public Views the State Courts* 41 (1999).[9]

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[9] A racial/ethnic breakdown of the figures revealed that 85.2% of African-Americans agreed with the statement. The figure was 80.4% for Latino responders. *Id.*

Furthermore, recusal based on *issue*-bias is conceptually inconsistent with the asserted purpose for opening up public debate among judicial candidates in the first place. Vermont's Justice Shepard goes so far as to suggest that liberalizing recusal procedures to encompass "issue bias" works a fraud on the public:

> The public has been induced to vote for a candidate in the belief that the candidate will implement a certain policy, say, imposing maximum sentences on wife beaters. Even while campaigning and promising this strict policy, however, the candidate knows that any wife beater brought before him will be able to prevent him from even hearing the case, much less imposing the maximum sentence. This arrangement for disconnecting free and unfettered campaign promises from any possibility they will be carried out . . . hardly results in the sort of open and robust democracy that critics of the Canons purport to defend.

Shepard, *supra* at 1082-1083.

Finally, liberalizing recusal procedures increases the strain on state court benches, who must shuffle the cases and calendars to an immune judge. And it is not implausible that judicial candidates will be induced by skilled lawyers into making commitments on issues (or seemingly so), for the very purpose of setting up a justification for a later disqualification. *Cf., MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1340 (Fla. 1990) (Kogan, J., dissenting) (danger that attorneys who wish to steer their cases away from a particular judge need do no more than contribute a large sum to that judge's campaign); *Pierce v. Pierce*, ___ P.3d ___, 2001 OK 97, 2001 WL

1408241, p. 10 (Ok. 2001) (Watt, C.J., concurring) (same). Such a circumstance is not far-fetched, considering that many lawyers today represent advocacy groups that are involved in issues of public importance and whose causes may be implicated in anticipated proceedings in a local court or in the State's high court.

CONCLUSION

Canon 5 is a legitimate and measured tool for balancing the competing democratic ideals of accountability and impartiality. For the reasons stated, Amici States respectfully urge the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

RELATED CANONS OF JUDICIAL ETHICS OF AMICI STATES

Ariz. R. Sup. Ct. 81, Canon 5B(1)(iv) ("announce")

Cal. Code Jud. Ethics, Canon 5B(1) ("commit")

Mo. R. Bar Rule 2.03, Canon 5(b)(1)(c) ("announce")

Mont. Canons of Jud. Ethics, Canon 30 ("announce")

Okla. Code Jud. Conduct, Canon 5A(3)(d)(ii) ("commit")

Tex. Govt. Code Ann., tit. 2, subtit. G app. B ("announce")

Wash. Code Jud. Conduct, Canon 7(B)(ii) ("commit")

APPENDIX B

STATE OF MINNESOTA IN SUPREME COURT

C4-85-697

In re the Code of Judicial Conduct

ORDER

In *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted*, (U.S. Dec. 3, 2001) (No. 01-521), the United States Court of Appeals for the Eighth Circuit held that the provision of Minnesota Code of Judicial Conduct that prohibits a candidate for judicial office from announcing "his or her views on disputed legal or political issues," Canon 5(A)(3)(d)(i) (the announce clause), as construed by the district court in *Republican Party of Minnesota v. Kelly*, 63 F.Supp.2d 967 (D.Minn. 1999), is narrowly tailored to further compelling state interests. It has come to the attention of this court that the interpretation of the announce clause by the federal district and appeals courts has given rise to questions about the interpretation of the announce clause by this court. We issue this order adopting the interpretation of the federal court of appeals to clarify our position to the Board on Judicial Standards and the Lawyers Board of Professional Responsibility, which have the first level of responsibility for enforcement of the Canon.

IT IS HEREBY ORDERED that the announce clause of Canon 5(A)(3)(d)(i) shall be enforced in accordance with the interpretation of that clause by the United States

Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).

Dated: January 29, 2001

BY THE COURT:

/s/
Kathleen A. Blatz
Chief Justice